

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Revision of the Commission's Rules To Ensure)	CC Docket No. 94-102
Compatibility with Enhanced 911 Emergency)	
Calling Systems)	
)	
Request for Temporary Waiver or Temporary)	
Stay of Section 20.18(g)(1)(v) of the)	
Commission's Rules)	
To: Chief, Wireless Telecommunications Bureau		

PETITION FOR TEMPORARY WAIVER OR TEMPORARY STAY

South Central Utah Telephone Association, Inc. (South Central), by its attorney, and pursuant to Sections 1.3 and 1.925 of the Commission's Rules, hereby requests a temporary waiver (or temporary stay), up to and including December 1, 2008, of the requirements of Section 20.18(g)(1)(v) of the Commission's Rules, within which to achieve 95 percent penetration of location-capable handsets among its Broadband Personal Communications Service (PCS) subscribers. Rule Section 20.18(g)(1)(v) requires that the 95 percent penetration level be reached no later than December 31, 2005.

In support of this request, the following is shown:

I. BACKGROUND

South Central, a rural area telephone cooperative, is a small, Tier III PCS licensee, as defined in the Commission's E-911 *Order to Stay*, FCC 02-210, released July 26, 2002. South Central serves the St. George, Utah BTA on the PCS F-block spectrum (station KNLG223) and utilizes Nortel Networks' CDMA equipment for its PCS network. On October 5, 2004, South

Central completed its acquisition of a partitioned portion of Qwest Wireless, LLC's E-Block PCS license for the Salt Lake City-Ogden, Utah BTA (station WQBL704). The partitioned area consists of Piute County, Utah and portions of Sevier and Wayne Counties, Utah.

There are seven Public Safety Answering Points (PSAPs) in South Central's current service area, including St. George, Utah; Panguitch, Utah; Richfield, Utah (serving Piute and Wayne Counties); Colorado City, Arizona (serving Hildale, Utah); Kanab, Utah; Cedar City, Utah; and Beaver, Utah. As of this filing, none of these PSAPs has requested E-911, Phase II service and none is ready to receive the service.

South Central has demonstrated a long history of compliance with the Commission's E-911 regulatory requirements. In a filing on November 30, 2001, South Central advised the Commission that, while it had initially planned to utilize a network-based technology in implementing E-911, Phase II service, it was having second thoughts due to the high costs of a network solution in its rural setting where there are relatively few, widely-spaced towers separated by uneven terrain.¹ Then, in a filing on July 24, 2003, South Central notified the Commission of its decision, due to prohibitive costs in utilizing a network-based technology in achieving compliance with E-911, Phase II requirements, to change to a handset-based automatic location information (ALI) technology.² Despite some initial delays – resulting from South Central's need to purchase and deploy a new wireless switch and the lack of availability of ALI-capable handsets that plagued small wireless carriers generally – South Central has met or exceeded all of the handset-based deployment benchmarks for Tier III wireless carriers.

Thus, South Central began selling and activating ALI-capable handsets on January 1,

¹ See, *Request for Rule Waiver*, CC Docket No. 94-102, filed November 30, 2001.

² See, *E-911 Interim Report*, CC Docket No. 94-102, filed July 24, 2003.

2003, well in advance of the September 1, 2003 deadline, and reached the 100 percent ALI-capable benchmark for new handset activation in advance of the November 30, 2004 deadline. South Central also timely met the intermediate activation benchmarks specified in Sections 20.18(g)(1)(i) – (iv) of the Commission’s Rules (*i.e.*, the 25 percent and 50 percent activation benchmarks).

In addition to its sale and activation of ALI-capable handsets, South Central has offered its subscribers financial incentives by allowing them to trade in their existing non-compliant handsets for ALI-capable models at a discount. Notifications of these financial incentives have been made by mail and by individual telephone calls. By way of these personal contacts, South Central has sought to educate its subscribers as to the benefits of location-capable handsets over their older units. Nevertheless, South Central cannot compel its subscribers to change out their handsets until they are willing to do so. Indeed, the Commission has acknowledged that rural subscribers historically have tended to hold on to their wireless handsets for much longer than customers in larger, metropolitan markets, and that this is a unique challenge to meeting the 95 percent ALI-capable handset penetration requirement.³

Thus, despite South Central’s best efforts, approximately only 77 percent of the handsets in use by its customers were ALI-capable, as of December 1, 2005. While this falls short of the 95 percent December 31, 2005 requirement, it demonstrates that South Central has achieved substantial compliance. The Commission must recognize that achieving total compliance is at least in part beyond South Central’s ability to control. Unlike prior benchmarks (*e.g.*, selling and activating ALI-capable handsets only) where achieving compliance was entirely

³ See *E911 Compliance Deadlines for Tier III Carriers*, 20 FCC Rcd. 7709, Para. Nos. 37, 68, 70, 79 n. 203, and 101 (2005) (the “*2005 E-911 Tier III Carriers Compliance Deadlines Order*”).

within the carrier's control, the 95 percent penetration benchmark requires efforts by the carrier *and*, at least as important, action by the carrier's subscribers. While South Central can control its efforts in seeking to convince its subscribers of the benefits of location-capable handsets and in providing financial incentives to induce them to change out their handsets, it has no control over its subscribers' decisions in that regard. Accordingly, South Central finds itself in the position of not being able to achieve compliance with the 95 percent penetration deadline by December 31, 2005 for a reason beyond its control, namely the desire of approximately 18 percent of its subscribers to retain their non-location capable handsets. While one can only speculate, the fact that none of the PSAPs in South Central's service area is ready to receive E-911, Phase II service may be a factor in the decision by certain of South Central's subscribers not to acquire location-capable handsets. Also contributing is the fact that South Central has a fairly stable and loyal customer base. With less than the typical "churn" activity, there is less opportunity to increase the penetration of ALI-capable handsets among its subscribership.

II. SOUTH CENTRAL HAS DEMONSTRATED A COMMITMENT TO ACHIEVING COMPLIANCE

As indicated, South Central has demonstrated a good faith commitment to achieving full compliance with the Commission's E-911 requirements. It has constructed a digital wireless network that is capable of providing E-911, Phase II service to the seven PSAP's in its service area. It began activating ALI-capable handsets immediately after such devices became available to it and it met the requirement that all new handsets activated be location-capable in advance of the deadline for Tier III carriers. In addition to achieving all benchmarks to date in a timely manner, South Central has made good faith attempts to replace all non-compliant handsets with ALI-capable units since it began selling such units in January of 2003. The inability to achieve

compliance with the 95 percent penetration deadline by December 31, 2005 results not from any inaction or lack of commitment by South Central but rather from certain of the subscribers themselves who, for their own reasons, are unwilling to give up their existing handsets for ALI-capable units. While South Central remains committed to meeting the 95 percent penetration requirement at the earliest possible date, its ability to do so will depend, at least in part, on the action or inaction of approximately 23 percent of its existing subscribers in replacing their existing non-compliant handsets and, to some extent, on the rate of “churn” among its subscribership.

III. TEMPORARY WAIVER OR STAY REQUEST

Accordingly, South Central requests a temporary waiver, or temporary stay, up to and including December 1, 2008, of the 95 percent ALI-capable handset penetration requirement set forth in Section 20.18(g)(1)(v) of the Commission’s Rules. The additional time requested will be needed to meet the requirement, which South Central will seek to accomplish by further promoting location-capable handsets via posters, bill inserts and advertising and featuring the discounted handsets on South Central’s website.

IV. WAIVER STANDARDS

The Commission’s waiver standards are set out in Sections 1.3 and 1.925(b)(3) of the Commission’s Rules. Section 1.3 of the Commission’s Rules states, in relevant part, that “[a]ny provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.” Section 1.925(b)(3) of the Rules states that the “Commission may grant a waiver request if it is shown that: (i) [t]he underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would

be in the public interest; or (ii) [i]n view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.” The courts have held that a rule waiver is appropriate “if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.”⁴ Under *WAIT Radio* and *Northeast Cellular Telephone Co.*, a rule waiver “may be granted in instances where the particular facts make strict compliance inconsistent with the public interest if applied to the petitioner and when the relief requested would not undermine the policy objective of the rule in question.”⁵

In its *E-911 Fourth Memorandum Opinion and Order*, the Commission indicated that the Phase II rules are intended to be applied in a manner that takes into account the practical and technical realities.⁶ Recognizing that practical and technical realities might delay Phase II implementation, the Commission established a general approach to dealing with possible requests for waiver of the Phase II requirements.⁷ Thus, the Commission provided that its rules may be waived for good cause shown, consistent with Section 1.3 of the Rules.⁸ It recognized, in the case of E-911, that there could be instances where technology-related issues or exceptional circumstances may mean that deployment of Phase II may not be possible by the established

⁴ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) citing *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972).

⁵ See In the Matter of Section 68.4 (a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones, *Order on Reconsideration and Further Notice of Proposed Rulemaking*, WT Docket No. 02-309, FCC 05-122 (rel. June 21, 2005) at Para. 50 n. 158.

⁶ 15 FCC Rcd. 17442 (2000) at Para. 22.

⁷ *Id.* at Paras. 42-45.

⁸ *Id.*

deployment deadlines.⁹ The Commission cautioned that waiver requests should be specific, focused and limited in scope, with a clear path to full compliance and should document the efforts aimed at compliance.¹⁰

In addition, Section 107 of the Ensuring Needed Help Arrives Near Callers Employing 911 Act of 2004 (the “ENHANCE 911 Act”)¹¹ directed the Commission to grant qualified Tier III carriers’ requests for relief of the December 31, 2005 95 percent penetration deadline for ALI-capable handsets if “strict enforcement of the requirements of that section would result in consumers having decreased access to emergency services.”

V. SOUTH CENTRAL HAS MET THE WAIVER STANDARDS

As shown above, South Central has met the Commission's standards for obtaining the requested temporary waiver (or temporary stay) of the 95 percent penetration requirement for ALI-capable handsets, as specified in Section 20.18(g)(1)(v) of the Commission’s Rules. Clearly, in view of the unique and unusual factual circumstances present here, application of the December 31, 2005 deadline would be inequitable, unduly burdensome and contrary to the public interest. In addition, South Central has no reasonable alternative but to request the instant waiver. Furthermore, grant of the requested relief would serve the public interest.

South Central is a small Tier III CMRS carrier that is licensed to provide broadband PCS in rural areas. It has elected to use a handset-based E-911 technology and has constructed facilities that are fully Phase II compliant. All new handsets activated on its network are ALI-capable and

⁹ *Id.*

¹⁰ *Id.*

¹¹ 118 Stat. 3986, 3991 (2004).

South Central met this requirement in advance of the November 30, 2004 deadline applicable to Tier III carriers. In addition, South Central has sought to replace its subscribers' pre-existing handsets with ALI-capable units since January of 2003. In this regard, South Central has taken steps to educate its subscribers as to the benefits of replacing their non-location-capable handsets with ALI-capable units and has offered financial incentives to do so. To date, however, certain of its subscribers, exceeding five percent of the total, have declined to replace their non-compliant handsets.

Thus, South Central has been diligent in its efforts to secure compliance with all applicable E-911 requirements of the Commission's Rules, including the December 31, 2005 requirement. Moreover, South Central has shown a clear path to achieving full compliance by its well-documented actions to date and by its plan to further promote location-capable handsets via posters, bill inserts, advertising and featuring discounted ALI-capable handsets on South Central's website.

Indeed, the benchmark relief requested herein is minimal, as it is confined to one discrete regulatory requirement. A request for minimal relief warrants its grant especially where, as here, the applicant has shown a plan to achieve full compliance.¹²

In addition, the inability to meet the December 31, 2005 95 percent handset penetration deadline is clearly due to circumstances beyond South Central's control; and, therefore, the delay in achieving compliance with the requirement is simply unavoidable.

¹² 2005 E-911 Tier III Carriers Compliance Deadlines Order, *supra*, at Para. Nos. 47, 50, and 63.

VI. THE REQUIREMENTS OF THE ENHANCE 911 ACT HAVE BEEN SATISFIED

The relief requested by South Central is fully consistent with the requirements of Section 107 of the ENHANCE 911 Act. That statutory provision directs the Commission to grant qualified Tier III carriers' requests for relief of the Rule Section 20.18(g)(1)(v) December 31, 2005 deadline for ALI capable handsets if "strict enforcement of the requirements of that section would result in consumers having decreased access to emergency services."

Absent grant of the requested relief, South Central would be forced to devote its limited capital resources to the task of tracking down those pre-existing subscribers who (for whatever reasons) have voluntarily elected to retain their non-location-capable handsets, and subsidizing 100 percent of the cost of a new handset *that the customer may not want and may not even use*, in order to achieve compliance with the 95 percent penetration requirement. South Central submits that these scarce resources would be better spent in continuing to extend the reach of its wireless network into rural and unserved (or underserved) areas, where access to any type of wireless telephone service (and basic 911 service) would not otherwise be available.

Alternatively, requiring strict compliance with the 95 percent penetration requirement could put carriers such as South Central in the untenable position of having to terminate service to those subscribers who voluntarily retained their non-location-capable handsets, in order to increase the percentage of compliant handsets among its subscribership. While South Central would never willingly follow any course of action that would limit its customers' access to wireless services, either alternative described above would result in the affected "consumers having decreased access to emergency services," in direct contravention of the ENHANCE 911 Act. Clearly, such

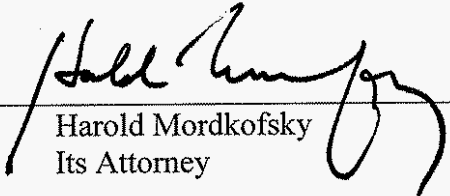
result runs counter to the policy objectives that underlie the Commission's E911 Rules – namely extending the availability of emergency services to wireless consumers – and would disserve the public interest.

VII. CONCLUSION

In view of the foregoing, the waiver herein requested is in the public interest and should be granted.

Respectfully submitted,

SOUTH CENTRAL UTAH TELEPHONE ASSOCIATION, INC.

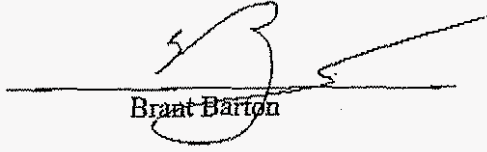
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DECLARATION

I, Brant Barton, hereby declare under penalty of perjury that I am the Chief Executive Officer and General Manager of South Central Utah Telephone Association, Inc.; that I have read the foregoing Petition for Temporary Waiver or Temporary Stay and am familiar with the facts set out therein; and that all such facts, except for those of which the Commission may take official notice, are true and correct to the best of my knowledge, information and belief.

Executed this 28th day of December, 2005.



Brant Barton